

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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No. 02-3328

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UNITED STATES OF AMERICA

v.

RONALD WHETHERS,  
Appellant

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Appeal from the United States District Court  
for the Western District of Pennsylvania  
(D.C. Criminal No. 95-cr-00036)  
District Judge: Honorable Robert J. Cindrich

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Submitted Under Third Circuit LAR 34.1(a)  
June 23, 2003

Before: RENDELL, SMITH and ALDISERT, Circuit Judges.

(Filed August 6, 2003 )

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OPINION OF THE COURT

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RENDELL, Circuit Judge.

Ronald Whethers appeals the order of the District Court for the Western District of Pennsylvania denying his motion for post-conviction relief under 28 U.S.C. §2255 (2001). Because Apprendi v. New Jersey, 230 U.S. 466 (2000), cannot be applied

retroactively to initial motions for post-conviction relief, we will affirm.

Ronald Whethers was charged with operating a large-scale cocaine trafficking ring in Southwestern Pennsylvania from 1989 to 1996. After a jury trial he was convicted of conspiracy to distribute and to possess with intent to distribute cocaine and money laundering. The amount of drugs involved was not submitted to the jury. The District Court found by a preponderance of the evidence that Whethers was responsible for more than 150 kilograms of cocaine. Based on this quantity, Whethers was sentenced to the statutory maximum, life in prison. 21 U.S.C. § 841 (b)(1)(A). The District Court explained that the harsh sentence was due to evidence of the violent nature of Whethers' drug organization.

On appeal, we upheld Whethers' conviction in a not-precedential opinion on July 10, 1998. United States v. Whethers, 159 F.3d 1354 (3<sup>rd</sup> Cir. 1998). On December 23, 1999, he filed a motion to vacate his sentence, pursuant to 28 U.S.C. § 2255. On June 26, 2000, the Supreme Court decided Apprendi v. New Jersey, 230 U.S. 466 (2000), holding that any facts increasing the statutory maximum sentence to which a defendant could be subject must be proved beyond a reasonable doubt and found by a jury at trial. On March 29, 2001, Whethers filed a motion to amend his Section 2255 motion, challenging his sentence under Apprendi.

The District Court had subject matter jurisdiction under 28 U.S.C. § 2255, and we exercise jurisdiction pursuant to Title 28 U.S.C. § 1291, and 28 U.S.C. § 2253 (a). We

review the issue of the retroactivity of Apprendi de novo. United States v. Lloyd, 188 F.3d 184, 186 (3<sup>rd</sup> Cir. 1999).

Whethers argues that the Apprendi rule is a substantive, not a procedural, rule. In the alternative, Whethers urges that if Apprendi is a procedural rule, to be analyzed using the rule set forth in Teague v. United States, 489 U.S. 288 (1989), it is nonetheless entitled to retroactive effect because Apprendi fits into one of the two exceptions to the general rule against retroactivity.

Whethers' arguments are to no avail. Recently, in United States v. Swinton, No. 01-1004, 2003 WL (3d Cir. June 23, 2003), and United States v. Jenkins, No. 01-1722, 2003 WL 21398812 (3d Cir. June 18, 2003), we have held that the Supreme Court's rule in Apprendi is a rule of criminal procedure that should be analyzed using the standard set forth in Teague. We determined further that Apprendi did not fit into either exception under Teague, because it did not "place[] certain kinds of conduct beyond the power of the criminal law-making authority to proscribe," or "require[] the observance of those procedures that.... are implicit in the concept of ordered liberty." Teague, 489 U.S. at 288. Jenkins and Swinton thus foreclose Whethers' arguments.

For the foregoing reasons, we will deny Whethers' §2255 motion for post-conviction relief.

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TO THE CLERK OF COURT:

Please file the foregoing opinion.

/s/Marjorie O. Rendell

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Circuit Judge

Dated: